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No. 93-374

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

IVAN VON ZUCKERSTEIN, DR. DEVABHAKTUNI RAMASWAMI, DR. MOHAN JAIN, and JOSIP VRESK,

Petitioners,

v.

ARGONNE NATIONAL LABORATORY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The questions stated in the petition are *not* raised by the decisions below or the trial court record. This case raises only the following questions, none of which is worthy of review by this Court:

1. Whether the court of appeals, reviewing the record *de novo*, correctly held that plaintiffs failed to introduce evidence sufficient to sustain a jury verdict in their favor on their Section 1981 claims of racial discrimination.

2. Whether the court of appeals correctly held that the district court did not abuse its discretion when it dismissed plaintiffs' Title VII discrimination and retaliation claims pursuant to Rule 41(b).[1]

3. Whether plaintiffs waived all issues relating to retroactivity of the Civil Rights Act of 1991 by failing to brief or argue such issues in the court of appeals.

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[1] The applicable provision has now been replaced by Rule 52(c).

LIST OF PARTIES

The parties to the proceeding in the court of appeals were the petitioners Ivan Von Zuckerstein, Dr. Devabhaktuni Ramaswami, Dr. Mohan Jain and Josip Vresk and the respondent Argonne National Laboratory. In the district court, plaintiffs initially were joined by Dr. Han Chang and later by his executrix, Poling Chang. Dr. Han Chang's appeal was dismissed by the court of appeals on September 3, 1991. On May 18, 1992, this Court denied Poling Chang's petition for a writ of certiorari seeking review of this dismissal.[2]

RULE 29.1 STATEMENT

Pursuant to Rule 29.1, Respondent submits the following information: Argonne National Laboratory is owned by the United States Department of Energy and operated under contract by The University of Chicago.

[2] Accordingly, respondent does not address herein any of petitioners' assertions regarding the claims of Dr. Han Chang.

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Argonne National Laboratory, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the judgments and opinions of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled proceeding on January 29, 1993 and April 7, 1993.

STATEMENT OF THE CASE

Petitioners Ivan Von Zuckerstein, Dr. Devabhaktuni Ramaswami, Dr. Mohan Jain, and Josip Vresk (collectively "plaintiffs") are former and current[3] employees of respondent Argonne National Laboratory ("Argonne"). Below, plaintiffs claimed that Argonne discriminated against them in various ways because they were "foreign born."[4] (S.A. 17-18).[5] At trial, and in the court of appeals, plaintiffs narrowed their discrimination claims to those discussed in the Seventh Circuit's opinion:

> Plaintiffs alleged discriminatory behavior by Argonne that violates section 1981 and Title VII in the denial of promotion, rehiring, and access to grievance procedures as well as in its lay-off procedure, and discriminatory retaliation and demotion. . . . [Under] *Patterson v. McLean Credit Union*, . . . only plaintiffs' denial of promotion, failure to rehire, and denial of access to grievance procedures are cognizable under section 1981 as well as Title VII. The lay off, retaliation, and demotion claims fall exclusively under Title VII.

(Pet. App. 5-6).

As the court of appeals noted (understating the case), "Making sense of the various claims brought by the plaintiffs requires some background information." (Pet. App. 2). The petition is of little help, stating a version of the facts unsupported by any record citation (with good reason, since it is not only unsupported by the record but is

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[3] Vresk is the only plaintiff still employed by Argonne.

[4] In their petition, plaintiffs have changed their characterization to "Immigrant Americans."

[5] References to the Supplemental Appendix filed by Argonne in the court of appeals will be designated "S.A."

in some instances directly contrary to the record evidence). The relevant facts established at trial are as follows:

A. Argonne National Laboratory

Argonne, owned by the United States Department of Energy ("DOE") and operated under contract by The University of Chicago, is one of the nation's major federally-funded research and development centers. (S.A. 11). As of 1984, Argonne employed more than 4,000 persons at its two sites in Illinois and Idaho. (S.A. 10-11). Many of the scientists and engineers at Argonne, including several in positions of significant authority, were born in non-English speaking foreign countries. (Tr. 1107-09).[6]

Each scientist or engineer occupies a niche in (at least) two chains of command—one administrative and the other programmatic. For administrative purposes, each scientist or engineer is given a position title which generally describes the functions performed by that individual (*e.g.*, economist, mechanical engineer, chemical engineer, etc.). (Tr. 202). For each such job title, there are three levels or ranks: assistant, full and senior. (*Id.*).

Argonne's guidelines for promotion provide that "[p]romotion to the level of [full] Scientist/Engineer requires ability to work independently in research or other fields, and to perform at a level of an experienced Ph.D. Scientist or Engineer." (S.A. 378). The guidelines also require that an individual seeking promotion have a substantial record of achievement in scholarly publications. (S.A. 379).

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[6] References to the Transcript of Proceedings will be designated "Tr."

Promotion to senior is for a select few at Argonne. (Tr. 206, 1906). Argonne's guidelines for promotion to senior provide as follows:

> The Senior classification is the highest at Argonne for scientists and engineers and is reserved for those staff members who have demonstrated ingenuity, originality, creativity, and leadership in research related activities of a scientific or technologic nature and whose performance at that level is ongoing. . . . For an individual in the field of engineering or applied science his or her professional standing must be such as to merit a professorship at a leading engineering institution or university or a leadership role in a major industrial organization. In general, the standard for Senior level requires evidence that the individual has a record of outstanding achievements and is well known and highly regarded in his/her professional field by national and, usually, by international peers.

(S.A. 380-81).

Each employee is assigned to a division which contains individuals who work in related fields (*e.g.*, nuclear reactors, engineering, environmental). (Tr. 198-202). Each division has a director, one or more associate directors, and various section heads and other administrative supervisors. (*Id.*). These supervisors are responsible for compiling evaluations of employees in their sections, even though these employees may not work closely (or at all) with their administrative supervisors. (Tr. 891-92, 937-38).

During the period relevant to Plaintiffs' claims, if the management of a scientist's or engineer's division believed that he or she merited promotion from assistant to full or from full to senior, the division put together a case and submitted it to an Argonne committee known as "Personnel Committee A." (Tr. 204, 341). Absent such a submission, a scientist or engineer could not be promoted. (Tr. 204).

Each of the scientific or engineering projects at Argonne also has its own programmatic reporting structure. The person formally responsible to Argonne and DOE for the project is designated the "principal investigator." (Tr. 411). The project is headed by a "project manager" who may or may not be the same person as the principal investigator. (Tr. 679-80). The project manager is responsible for supervising and evaluating all individuals working on the project. (Tr. 937-38). His or her written evaluation of the performance of each scientist or engineer on the particular project is forwarded to that employee's administrative supervisor, who reviews all such evaluations for each employee and prepares a summary evaluation. (Tr. 563, 937-38). It is not unusual for individuals in one division to work on projects headed by and primarily staffed by individuals in another division. (Tr. 2341-42).

The project manager or principal investigator may be an assistant, full or senior scientist or engineer. (Tr. 462). A senior scientist is no more likely than an assistant scientist to head up a project. (Tr. 339, 462). Indeed, many senior scientists prefer to spend their time on their own research activities, rather than deal with the headaches of managing projects. (Tr. 215-16, 339).

B. Employment Histories of the Plaintiffs

1. Ivan Von Zuckerstein

Von Zuckerstein was born in Czechoslovakia. (Tr. 1964). At trial, he testified that his "mother was partly Austrian, partly Czechoslovakian or Bohemian" and his father "partly German and partly Jewish." (Tr. 1965).

On December 1, 1976, Von Zuckerstein began working at Argonne as an assistant economist in Argonne's Energy & Environmental Systems Division (the "EES Division").

(S.A. 12). During most of his employment at Argonne, Von Zuckerstein worked on projects studying the feasibility of community energy systems. (Tr. 2177-79).

In March 1983, the EES Division was forced to eliminate ten staff positions as a result of cutbacks in funding. (Tr. 220-21, 651). At the time, Von Zuckerstein was working as a systems application economist.[7] (S.A. 60). Three of the four systems application economist positions in the EES Division were eliminated during the March 1983 layoff. (S.A. 25). The individual retained, Arvind Teotia, was born in India. (S.A. 28; Tr. 657). Since Von Zuckerstein was either unqualified for positions remaining after the reduction in force or less qualified than the incumbents in such positions, his employment was terminated effective May 31, 1983. (S.A. 12, 26-31, 46, 51, 53, 59-60, 66-67, 102-47, 505-06).

At trial, Von Zuckerstein testified that he applied for more than 50 positions at Argonne after his layoff. (Tr. 2108, 2110-11). However, he failed to identify any of these positions. Martin Bernard ("Bernard"), who held management positions responsible for Von Zuckerstein's administrative section and the programs on which Von Zuckerstein worked, did testify as to eight positions for which Von Zuckerstein applied. (Tr. 671-75; S.A. 394-411). Von Zuckerstein was not rehired into any of these positions because he failed to meet the minimum qualifications. (*Id.*).

2. Dr. Devabhaktuni Ramaswami

Ramaswami was born in India. (S.A. 12). In January 1962, Ramaswami was hired by Argonne as a resident

[7] While this was Von Zuckerstein's functional job title, his rank was still assistant economist. (S.A. 31).

research associate in Argonne's Chemical Engineering Division. (S.A. 13). In November 1962, Ramaswami's job title was changed to assistant chemical engineer. (*Id.*). In July 1964, Ramaswami was promoted, after approval by Personnel Committee A, to associate chemical engineer. (*Id.*). In 1972, Argonne dropped the "associate" term and began referring to scientists or engineers with this rank as "full" scientists or engineers. (*Id.*).

On April 16, 1973, Ramaswami was laid off from his job of chemical engineer and placed on unpaid resident associate status. (*Id.*). On June 4, 1973, Ramaswami was rehired as a chemical engineer in the Engineering Division (the "ENG Division"). (*Id.*).

In the early 1980's Ramaswami was working on the SAREF/TREAT reactor upgrade project. (Tr. 101; S.A. 412-19). Completion of the design effort for the project resulted in a reduction in the demand for ENG Division personnel in Ramaswami's job title, and Ramaswami was scheduled for layoff. (S.A. 420-28).

As the result of efforts by his superiors in the ENG Division and management officials in the EES Division, Ramaswami was not laid off. Instead, he obtained a series of temporary assignments to projects headed by individuals in the EES Division. (S.A. 442-46). In July 1985, William Schertz ("Schertz"), Associate Division Director of EES, obtained approval to transfer Ramaswami to the EES Division and to remove him from the list of individuals to be laid off. (S.A. 448). At that time, Schertz requested that Ramaswami begin work immediately on a project with Alan Wolsky ("Wolsky"). (*Id.*). Schertz told Ramaswami that Wolsky had an immediate need for Ramaswami's services and that any delay would seriously jeopardize Ramaswami's work arrangement with Wolsky. (*Id.*). Instead of beginning Wolsky's work, Ramaswami chose to take an

extended vacation. (S.A. 448-49). As a result, Schertz decided that Ramaswami would not be transferred to the EES Division. (S.A. 443, 448). Because there were still no positions for Ramaswami in the ENG Division, he was terminated on September 30, 1985. (S.A. 442-46).

Prior to the effective date of his layoff, Ramaswami requested transfers to three senior positions which had been posted by Argonne. (Tr. 157-67). After he was laid off, Ramaswami was rejected for each of these positions because he lacked the needed skill and experience. (S.A. 452-59; 492).

3. Dr. Mohan Jain

Jain was born in India. (S.A. 14). In January 1980, Jain began working at Argonne as an assistant mechanical engineer in the EES Division. (*Id.*). In 1982, Jain helped Dr. John Bratis, a leader in the field, develop the Organic Rankine Cycle ("ORC") fluid test plan, which was part of Argonne's Industrial Cogeneration project. (Tr. 1796-97). When Bratis left Argonne, Jain became co-principal investigator for the Industrial Cogeneration project, along with Roy J. Faddis ("Faddis"). (Tr. 412-13). Faddis was responsible for administration of the project, while Jain was responsible for technical aspects, including design and construction of four test loops. (Tr. 678).

By 1983, construction of the test loops was considerably behind schedule. (Tr. 1841-44, 1958; S.A. 460-61). The DOE sponsor was extremely dissatisfied with the technical management of the project. (Tr. 678). As a result, Jain's *title* of principal investigator was removed. (Tr. 1742). However, Jain's *responsibilities* did not change significantly. (Tr. 1837-38).

As a result of reduced funding and redirection of programmatic areas, the EES Division had to eliminate one mechanical engineer-industrial cogeneration position in November 1984. (S.A. 269). Applying the layoff procedure, Jain was the lower rated of the two incumbents in this position. (S.A. 274-75). Since Jain was either unqualified for positions remaining after the reduction in force or less qualified than the incumbents in such positions, his employment was terminated effective January 18, 1985. (S.A. 269-73, 274-77).

At trial, Jain testified that he applied for a few positions at Argonne after his layoff. (Tr. 1791-92). However, he did not identify the specific positions for which he applied. (*Id.*). He was not rehired.

4. Josip Vresk

Vresk was born in Croatia but identified himself to Argonne and in his Complaint as Yugoslavian. (Tr. 1469; S.A. 2, 468). On October 1, 1975, Vresk was employed as an engineering specialist with the ENG Division. (S.A. 15). In May 1981, Vresk was promoted from engineering specialist to (full) mechanical engineer. (*Id.*).

In 1984, Vresk's section was moved from the ENG Division and combined with the Plant Systems Division to form the Plant Facilities & Services ("PFS") Division. (Tr. 1505). Vresk's section then was broken up into several sections, including the Project Management section and Engineering section. (Tr. 1506-07; S.A. 465). Vresk was assigned to the Engineering section. (S.A. 465). Among the individuals eventually assigned to the Project Management section was Sam Ambegaoker, who was born in India. (Tr. 1635-36). Rab Malhotra, who also was born in India, was a manager in the PFS Division. (Tr. 1570).

C. Argonne's Layoff Procedures

1. EES Division (Von Zuckerstein and Jain)

At trial, Plaintiffs introduced evidence of the comprehensive procedures used by the EES Division, which employed Von Zuckerstein and Jain, to determine who would be laid off and who would survive in the 1983 and 1984 reductions in force. (Tr. 222-24, 759-61). These procedures were developed by Hay Associates, a human resources consulting firm. (Tr. 1181). After Division management decided which positions to eliminate as the result of funding cutbacks, a nominating committee of nine Division officials met to select candidates for the positions that would remain. (Tr. 223, 576-77). For each position, knowledge and skills necessary to perform the job were identified, and elaborate guidelines were followed for assessing the levels of each candidate's knowledge and skills. (Tr. 222-24, 650-52; S.A. 25-366). Candidates were given ratings, based on their most recent evaluations, for positions they currently held and all other positions for which they had the minimum necessary knowledge and skills. (S.A. 25-366). There also was a list of tie-breaking criteria, the first of which was "affirmative action (minority/female)." (S.A. 27).

When the nominating committee met to assess candidates, two observers from outside the Division were present. (S.A. 26). Individuals familiar with the work of various candidates also were brought into the meeting to share their views of the candidates' knowledge and skills. (S.A. 26-27, 270; Tr. 224).

The Committee then prepared a report (the "layoff package"), which was automatically reviewed by the associate Laboratory director responsible for that division. (S.A. 25-366; Tr. 1180). If the associate Laboratory director approved the layoff package, it was then reviewed by the

Laboratory director's RIF Committee, composed of a division director, a human resources manager, and Argonne's affirmative action officer. (Tr. 1181). This committee was empowered to disapprove the layoff package or send it back to the division nominating committee for further justification of its findings. (Tr. 1182). Both Von Zuckerstein's and Jain's layoff packages were approved. (S.A. 462-63; 505-06).

2. ENG Division (Ramaswami)

When the ENG Division first chose Ramaswami as a candidate for layoff, it followed a procedure similar to that followed by the EES Division. (S.A. 420-28). Although the ENG Division layoff committee did not develop numerical ratings for each candidate, candidates were ranked based upon their most recent evaluations. (*Id.*). Once the committee made its decision, the layoff package it produced went through the same review process as the EES Division layoff package. (Tr. 1180-81). In Ramaswami's case, the director's RIF committee sent the package back for additional justification for Ramaswami's layoff. (S.A. 429-41; Tr. 1182, 2322). The committee then provided a specific reason for choosing to lay off Ramaswami and retain each of five individuals with performance ratings similar to Ramaswami's. (S.A. 429-31; Tr. 2330-35).

After Ramaswami's lengthy series of temporary positions in the EES Division ended, a committee of ENG Division managers once again reviewed Ramaswami's relative qualifications for positions remaining in the Division. (S.A. 442-51). Ramaswami was given a rating based upon his most recent performance evaluations, and he was compared to incumbents with similar ratings. (S.A. 443-46). The committee provided a specific reason for choosing to retain each incumbent and to lay off Ramaswami. (*Id.*).

D. Internal Grievance Procedures

Von Zuckerstein, Ramaswami and Jain all challenged their layoffs pursuant to an Argonne policy known as "equity review." (Tr. 1164-65, 1866, 2106). Under the equity review procedure, the highest Argonne official who initially approved the layoff reviewed the employee's complaint and the layoff package. (S.A. 374). If this official once again approved the layoff, the Laboratory director or his designee(s) would conduct a final review. (*Id.*; Tr. 1079).

In the cases of Von Zuckerstein and Jain, the Laboratory Director completed his review and notified each employee that he had upheld his layoff. (Tr. 2108; S.A. 464). In Ramaswami's case, the equity review process was modified when Ramaswami filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). Argonne conducted the same investigation it would have conducted if the normal equity review procedure had proceeded. (Tr. 1167). The only difference was that the findings of the investigation were communicated to the EEOC rather than to Ramaswami directly. (*Id.*).

E. District Court and Seventh Circuit Opinions

Trial began on April 3, 1991. On April 24, 1991, the district court granted Argonne's motion for directed verdict on all of plaintiffs' Section 1981 claims. The court also dismissed, pursuant to former[8] Rule 41(b) of the Federal Rules of Civil Procedure ("Rule 41(b)"), all of plaintiffs' claims of racial or national origin discrimination under Title VII. The court deferred ruling on Argonne's motion to dismiss plaintiffs' Title VII retaliation claims, requesting that the

[8] The applicable provision has now been replaced by Rule 52(c).

parties submit additional argument. (Tr. 2666-70). On May 31, 1991, the court granted Argonne's motion to dismiss plaintiffs' remaining Title VII retaliation claims and entered judgment for Argonne.

The district court directed a verdict in Argonne's favor as to plaintiffs' Section 1981 claims because plaintiffs failed to introduce sufficient evidence to sustain a verdict that they were the victims of discrimination on the basis of their races. (Pet. App. 43). Indeed, they did not even attempt to prove such discrimination. Instead, they spent three weeks attempting (unsuccessfully) to show that they were the victims of systematic discrimination by Argonne against foreign-born employees—a claim not cognizable under Section 1981. (*Id.* at 43-44, 56).

Plaintiffs' Section 1981 claims also failed because they did not introduce sufficient evidence to establish a *prima facie* case of discrimination or to show that the nondiscriminatory reasons given by Argonne for its actions were pretextual. (*Id.* at 47-48). Plaintiffs failed to show that they were qualified for the promotions allegedly denied them or for the positions in which they said Argonne should have rehired them. (*Id.* at 54-55, 64-68). Plaintiffs also failed to show that they were denied access to any internal grievance procedure. (*Id.* at 34).

The district court also dismissed plaintiffs' Title VII claims. Having failed to introduce sufficient evidence to prove a *prima facie* case or show pretext in their promotion, rehire and grievance claims under Section 1981, plaintiffs could not prevail on these claims under Title VII. Plaintiffs' Title VII layoff claims failed because plaintiffs introduced no evidence that the determinations made by the layoff decisionmakers were pretextual. (*Id.* at 57). The district court noted that the diffusion of decisionmaking

authority and the several layers of review in the layoff process imposed upon plaintiffs a burden of showing widespread discriminatory animus which they completely failed to meet. (*Id.*).

Plaintiffs' claims that Argonne refused to rehire them in retaliation for their filing of discrimination charges failed not only because plaintiffs were not qualified for the jobs for which they allegedly applied, but also because plaintiffs failed to show any causal link between their filing of charges and any decision not to rehire them. (*Id.* at 64).

Plaintiffs timely appealed, essentially on the grounds that the district court improperly weighed the evidence in deciding the motion for directed verdict (Pet. App. 5) and abused its discretion in dismissing the Title VII claims under Rule 41(b). The court of appeals affirmed, holding that plaintiffs failed to introduce evidence sufficient to sustain a jury verdict in their favor, the appropriate standard under *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 252 (1986). (Pet. App. 5). The court also held that there was nothing in the record to suggest that the district court's decision to dismiss the Title VII claims was clearly erroneous. (Pet. App. 13-15).

REASONS FOR DENYING THE WRIT

I.

Because The Court Of Appeals Followed The Precedents Of This Court, The Decision Below Raises No Questions Worthy Of Review By This Court—Petitioners Just Disagree With The Outcome.

Applying well-settled principles applicable to review of directed verdicts and Rule 41(b) dismissals, the court of appeals correctly concluded that plaintiffs had simply failed to introduce sufficient evidence to state a *prima facie* case of discrimination or retaliation as to any of Argonne's decisions affecting them. The petition is nothing more than an attempt to relitigate the case before this Court—an inappropriate forum in which to revisit issues that turn solely on the unique facts of this case. In several instances, petitioners have distorted either the holdings of the court of appeals or the factual record developed in the district court. The Seventh Circuit's summary of the facts relevant here is complete and accurate; its analysis of the applicable law covers no new ground and departs not at all from this Court's precedents or decisions in other circuits. As the following discussion of each question stated by petitioners shows, there is no reason to grant the writ:

A. The Court Of Appeals Did Not Hold That An Employer Is Not Liable For Discrimination By Its Agents.

As plaintiffs acknowledge in their petition, the Seventh Circuit, like all the courts of appeal, has held that an employer is liable, based on agency principles, for the discriminatory actions of its supervisory personnel. (Pet. 16-17). Nowhere in the opinion below is there any indication that the court departed from these well-settled prin-

ciples. Plaintiffs' mistaken belief that it did apparently is based on a misreading of the following holding:

> While the plaintiffs may have offered evidence of racial animus on the part of supervisors at Argonne, none has offered any direct evidence of discriminatory intent on the part of Argonne.

(Pet. App. 7).

The Seventh Circuit here was simply saying that there was conceivably some evidence that some supervisors may have had racial animus at some point in time, but no direct evidence that this alleged animus affected any employment decision by Argonne. The holding thus turned on the Court's review of the record—it broke no new ground worthy of review by this Court.

B. The Seventh Circuit's Holding That Plaintiffs Produced No Direct Evidence Of Discrimination Is Fully Supported By The Record, And The Court Correctly Applied The Burden-Shifting Analysis Of McDonnell Douglas.

Plaintiffs' contention that the Seventh Circuit misanalyzed their case is based on (a) a misreading of the court's opinion; (b) a misunderstanding of the meaning of "direct evidence"; and (c) misrepresentation of the trial record, particularly the "direct evidence" they claim to have introduced.

Petitioners say that a discrimination plaintiff can shift the burden of proof to his employer by introducing direct evidence of discriminatory intent. (Pet. 18-20). The court of appeals said the same thing, citing (like plaintiffs) *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). (Pet. App. 7). Plaintiffs' assertion that the Seventh Circuit went on to misapply the settled law does not make

this case worthy of the Court's review—especially since the record below belies plaintiffs' assertion.

Plaintiffs point to a few bits of anecdotal evidence and contend that these constitute "direct evidence" sufficient to require the district court to allow their case to go to the jury. " '[B]y definition, direct evidence, if believed by the trier of fact, will prove the particular fact in question, without reliance upon inference or presumption.' " *Lynch v. Belden & Co.*, 882 F.2d 262, 269 (7th Cir. 1989), *cert. denied*, 493 U.S. 1080 (1990) (quoting *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 569 (7th Cir. 1989)). None of the anecdotal evidence discussed by plaintiffs was found by the courts below to have such probative value. To the extent plaintiffs actually introduced the evidence described in their petition,[9] it generally related to their Title VII claims and thus has nothing to do with the appropriateness of the directed verdict. The court of appeals correctly analyzed the import of the evidence cited by plaintiffs as follows:

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[9] Some of the "direct evidence" cited by plaintiffs is no evidence at all—it is fabrication. For example, no one testified that "Jain cannot be a program manager of his program because the 'sponsor did not want an Indian in charge.' " (*See* Pet. 3). The actual testimony is discussed *infra*. Nor did "Supervisor Meshenberg conduct[ ] a study of Von Zuckerstein's ethnicity and determine[ ] it to be German." (*See* Pet. 5). The district court described what actually happened as follows:

> With Mr. Von Zuckerstein, we end up pretty much with the change of position from being Central European Jewish to, aside from being Jewish, being German, primarily because Meshenberg said, in effect, I didn't even know he was Jewish because of his name, he had a "von" in front of his name.

(Tr. 2655). When *plaintiffs' attorney* suggested that there had been a history of animosity between Germans and Jews, Meshenberg agreed. (Tr. 994-95). His acknowledgement of undeniable fact hardly constituted "direct evidence" of a discriminatory animus against Germans in general or Von Zuckerstein in particular.

With regard to Bernard's comment that Von Zuckerstein would not be rehired because he was suing Argonne, the court stated:

> Von Zuckerstein did not identify any specific positions that he may have sought. This testimony alone does not allow even an assessment of whether he would have met the qualifications necessary for those positions or whether Argonne continued to solicit others for those positions. In addition, Von Zuckerstein did not challenge the testimony of another Argonne employee who testified to Von Zuckerstein's lack of qualifications for eight positions sought.

(Pet. App. 11).

As for the alleged comment that a Department of Energy sponsor did not like Indians, the court stated:

> Finally, Jain contends that his removal as principal investigator of the Industrial Cogeneration Project was racially motivated. Plaintiff's witness testified to a conversation in 1983 with two administrative personnel in which one of the administrators claimed that "the sponsor did not want an Indian in charge of the program." (Tr. 425). Both of those administrators deny such a statement was made. (Tr. 679, 820). Subsequent to the alleged statement, Jain was removed as principal investigator although he continued to exercise programmatic responsibilities on this project. Assuming that this conversation did take place, Jain would have established by inference the existence of a racial motivation for his removal. However, administrative supervisors from Argonne testified to other credible reasons for his removal, principally extreme delays in the project. Jain offered no reason to suggest that this explanation was pretextual. Consequently, we cannot conclude that the district court's decision to dismiss this claim was clearly erroneous.[10]

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[10] This was the correct standard, since this claim was cognizable only under Title VII.

(Pet. App. 14-15).

This case thus presents no occasion for this Court to revisit the holding of *Thurston*, as correctly followed by the Seventh Circuit.

C. The Seventh Circuit Did Not Hold That An Employer May Deny An Employee Access To Grievance Procedures Because The Employee Has Filed An EEOC Charge.

Contrary to plaintiffs' assertion, the Seventh Circuit did not hold that employers may deny employees access to grievance procedures because the employees have filed EEOC charges. The court simply affirmed the trial court's finding that plaintiffs *had* access to all the procedures to which they were entitled:

> The equity reviews[11] of Von Zuckerstein and Jain were pursued to their conclusions and both received letters confirming their lay offs. Although Ramaswami's internal equity review was interrupted by his filing a claim with the EEOC, he was not prejudiced because Argonne's investigation of grievances filed with the EEOC did not differ meaningfully from its own internal procedures. Ultimately, Argonne communicated the results of its review to the EEOC rather than notifying Ramaswami directly. None of the plaintiffs were prejudiced under these circumstances.

(Pet. App. 11-12).

Thus, this case does not raise any issue regarding the appropriateness of cutting off internal grievance procedures when a grievant files an EEOC charge.

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[11] The evidence at trial showed that this was the only "grievance procedure" to which plaintiffs sought access.

D. The Decision Below Does Not Raise Any Question As To The Now-Defunct "New And Distinct Relation" Test Under Patterson.

If this Court were inclined to revisit the now-defunct "new and distinct relation" test of *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), this would not be the case in which to do so. Except as to plaintiff Vresk, the court of appeals' affirmance of the directed verdict as to plaintiffs' promotion claims did not rest on *Patterson*:

> . . . Even assuming, *arguendo*, that [plaintiffs' promotion] claim[s] would meet the *Patterson* standard, plaintiffs' claims would not succeed for another reason.
>
> Senior scientist positions are very competitive at Argonne, and the decision to promote is based on a number of considerations. . . . [T]he record shows that no one among the senior personnel in his division considered Ramaswami eligible for the position of senior scientist inasmuch as none of them pushed for his promotion. Thus, Ramaswami cannot succeed on this claim without something more.
>
> Von Zuckerstein similarly relies on the indirect method of establishing discrimination, arguing that first hostility toward Central European Jews and later, in a puzzling about-face, hostility toward Germans resulted in his denial of promotion to full scientist. Other than his own assertions, Von Zuckerstein offered no evidence of discrimination. More importantly, Von Zuckerstein's failure to achieve the rank of full scientist appear [sic] to lie in his sparse publication record and his inability to work independently. As a result, none of his superiors ever presented a case for his elevation to Personnel Committee A. Finally, no evidence was presented that someone with a similar or less qualified background was promoted to the positions Von Zuckerstein sought.
>
> Jain does not specifically allege the denial of promotion. (The refusal of Argonne to restore Jain to the

> post of principal investigator does not constitute a failure to promote.) In his testimony he does refer to a single instance in which he was not elevated. (Tr. 1849). However, the job position was available for a full mechanical engineer; since Jain was only an assistant mechanical engineer at that time, he did not meet the qualifications for that position. Because he did not formally pursue a promotion through Personnel Committee A, Jain cannot therefore argue discrimination in a denial of promotion as such.
>
> Vresk does not claim a denial of promotion in the sense of not being elevated from assistant to full engineer; he was already a full mechanical engineer. Rather, he claims that he should have been placed in the Project Management Section of the PFS Division when his section was moved from EES and broken up. This promotion claim is based on a denial of a programmatic rather than an administrative promotion. To succeed such a claim must "rise[ ] to the level of an opportunity for a new and distinct relation between the employee and the employer." *Patterson*, 491 U.S. at 185, 109 S.Ct. at 2377. Because of the overlapping assignments on the administrative and programmatic ladders and temporary nature of many of the programmatic assignments, it would appear that the programmatic promotion allegedly denied to Vresk on racial grounds does not rise to the level of a claim actionable under section 1981.

(Pet. App. 8-10).

Plaintiffs' disagreement with these holdings is based entirely on their own unsupported version of the facts, not on any quarrel with the law applied by the Seventh Circuit. This Court "do[es] not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent find-

ings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 275 (1949). Plaintiffs' disagreement with the outcome of the Seventh Circuit's review of the record is no ground for review by this Court.

E. The Court of Appeals Followed This Court's Precedents In Reviewing The Directed Verdict.

Plaintiffs' attack on the Seventh Circuit's affirmance of the directed verdict also focuses not on an improper standard of review but on plaintiffs' unhappiness that the court of appeals did not see things their way when it applied the appropriate standard. The Seventh Circuit correctly set forth the ground rules as follows:

> Plaintiffs further contend that the district court improperly weighed the evidence in deciding the motion for directed verdict. Under our *de novo* review of the record, this court will affirm if it finds that "under the governing law, there can be but one reasonable conclusion as to the verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); *see Anderson v. Gutschenritter*, 836 F.2d 346, 348 (7th Cir. 1988). The evidence is construed in the light most favorable to the plaintiffs. Unless we find evidence sufficient to sustain a jury verdict in favor of the plaintiffs, we will affirm the decision of the district court. *Liberty Lobby*, 477 U.S. at 252; *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554, 110 S.Ct. 1331, 1338, 108 L.Ed.2d 504 (1990). While the district court may not resolve conflicts in the testimony or weigh the evidence, it may evaluate evidence at least to the extent of determining whether there is substantial evidence to support the verdict. "[A] mere scintilla of evidence will not suffice."

La Montagne v. American Convenience Products, Inc., 750 F.2d 1405, 1410 (7th Cir. 1984).

(Pet. App. 5).

Plaintiffs agree that these are the appropriate standards, but accuse the court of appeals of departing from them. There is nothing in the court of appeals' opinion to support these accusations. Plaintiffs seek review by this court despite the absence of any important question of law because the court of appeals rejected the version of the facts set forth in the petition. That version of the facts nowhere appeared in the record below, and this is not the forum in which to retry plaintiffs' case.

F. The Seventh Circuit Has Never Held That Racially Motivated Retaliation Is Not Cognizable Under Section 1981.

The Seventh Circuit held that plaintiffs' retaliation claims were brought under Title VII because plaintiffs were claiming that Argonne retaliated against them for filing Title VII charges with the EEOC. Plaintiffs cite no authority to the effect that such claims are cognizable under Section 1981. They state only that "racially motivated retaliation" claims can be brought under Section 1981, and, *as plaintiffs point out in their petition*, the Seventh Circuit agrees. (Pet. 27) (citing *Mozee v. American Commercial Marine Serv. Co.*, 940 F.2d 1036 (7th Cir. 1991), *cert. denied*, 113 S. Ct. 207 (1992); *McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1306 (1991)). To the extent plaintiffs claimed that Argonne took adverse action against them based on their *race*, the courts below considered their claims cognizable under Section 1981. (Pet. App. 6, 18-19). To the extent plaintiffs were claiming retaliation for filing EEOC charges,

the courts below considered their claims cognizable only under Title VII. There was no error here,[12] and thus nothing to merit this Court's review.

II.

Petitioners Raised No Issue Below Regarding Retroactivity Of The Civil Rights Act Of 1991.

Below, plaintiffs never argued that the Civil Rights Act of 1991 (the "Act") applied to their claims, and they cannot do so now.[13] This is not the forum in which to raise such issues for the first time.[14] *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981).

Had it not been waived below, the issue of retroactivity still would be unworthy of review by this Court because it is raised by plaintiffs in a context unworthy of review by *any* court. Plaintiffs' suggestion that under the Act *they* would be awarded costs here is based on a misreading of 42 U.S.C. § 2000(e)-5(g)(2)(B). That provision defines the relief available to plaintiffs who *prevail* in a Title VII case by proving that their employer was motivated by a protected characteristic. Here, the trial court found, and the court of appeals affirmed, that Argonne was *not* moti-

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[12] *See, e.g., McKnight v. General Motors Corp.*, 908 F.2d 104, 112 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1306 (1991); *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1535 (11th Cir.), *cert. denied*, 498 U.S. 943 (1990).

[13] In the district court and court of appeals, plaintiffs were represented by attorneys experienced in employment-related litigation.

[14] This term, the Court will decide whether the Act is retroactive in cases in which the issue *was* argued below. *Landgraf v. USI Film Prod.*, 968 F.2d 427 (5th Cir. 1992), *cert. granted*, 113 S. Ct. 1250 (1993); *Harvis v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 1250 (1993).

vated by plaintiffs' race, national origin, or filing of EEOC charges when it took adverse action against plaintiffs. The notion that plaintiffs should *still* be entitled to costs is absurd.

III.

Both Argonne And The Seventh Circuit Agreed That If A Verdict Had Not Been Directed On Plaintiffs' Section 1981 Claims, The Rule 41(b) Dismissal Of Identical Claims Brought Under Title VII Would Have Been Improper.

The final issue raised by plaintiffs is not raised by this case. Both Argonne and the court of appeals acknowledged below that if a verdict had not been directed on plaintiffs' Section 1981 claims, the Rule 41(b) dismissal of identical claims brought under Title VII would have been improper. As the court of appeals correctly held:

> On the present facts, if the district court had directed a verdict on plaintiffs' section 1981 claims because it had dismissed their Title VII claims, its directed verdict would then rise to the level of a denial of the Seventh Amendment right to a jury trial. *See, e.g., Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348, 355-57 (7th Cir. 1987). In this instance the district court did not decide plaintiffs' Title VII claims prior to their Section 1981 claims. Thus, the only prejudice alleged here is the directed verdict itself, which is no prejudice at all.

(Pet. App. 4).

Even plaintiffs do not disagree with this; they simply misunderstand it. Accordingly, there is nothing here to review.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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